



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 17th day of September, 2004

Application of

DELTA AIR LINES, INC.

for an exemption from 14 CFR 212.8,
permitting use of letter of credit in lieu of
surety bond, and from 14 CFR 212.3,
permitting limited waiver of advance charter
payment

Docket OST-2003-15944-06

Served: September 22, 2004

ORDER TO SHOW CAUSE

Summary

By this order, we tentatively conclude that Delta Air Lines, Inc. (Delta), a direct air carrier holding a certificate issued under 49 U.S.C. 41102, should receive a one-year exemption from the requirements of 14 CFR 212.3(e), to give it the option of providing single-entity charters using large jet aircraft (with more than 100 seats) to Fortune 500 Companies, as defined herein, without receiving payment of the entire charter price prior to the commencement of travel.

Background

On August 12, 2003, Delta Air Lines, Inc. ("Delta"), requested an exemption from 14 CFR 212.3(e) and 212.8(c) with respect to its charter air transportation services. Delta requested approval of its use of a standby letter of credit in lieu of a surety bond to provide financial protection for customer advance payments under §212.8(c), and an exemption from the advance payment requirement of §212.3(e) in the case of certain single-entity charters by "select Fortune 500 corporations, professional sports teams, or colleges or universities." By Order 2003-11-16, issued November 19, 2003 (as amended by Order 2004-1-7, issued January 12, 2004), the Department granted Delta an exemption from the bond requirement of §212.8(c), with certain conditions, and deferred decision on the second request. We now address Delta's second request.

Delta has stated, *inter alia*, that an exemption from the advance payment requirement of §212.3(e) would reduce "burdensome and unnecessary transaction costs," and would be

consistent with the objectives of the Airline Deregulation Act (ADA), 49 U.S.C. 40101(a)(6). Delta has suggested that the exemption should be “limited to single-entity charters for select Fortune 500 corporations, professional sports teams, and colleges and universities for charters of large jet aircraft having 100 or more seats.”

Only one comment, submitted by Kenneth A. Moninski, was received in response to Delta’s application. Letter from Mr. Moninski, OST-2003-15944-02 (Sept. 4, 2003). While supporting Delta’s request for relief from 14 CFR 212.8, Mr. Moninski objected to Delta’s request for a waiver of the advance payment requirement, arguing, in part, that the grant of such an exemption to Delta alone would give Delta an unfair competitive advantage relative to other certificated charter air carriers. Mr. Moninski complained that giving Delta the option of waiving the advance payment requirement “would create a two-tier marketplace for single-entity charter flights,” in which the financial costs and inconveniences associated with complying with section 212.3(c) could be avoided by Delta and its customers alone. *Id.* at 3.

Discussion

We are charged not only with consumer protection, but also with maximizing reliance on competitive market forces to ensure a vibrant and dynamic marketplace. 49 U.S.C. 40101(a)(6). Delta invokes this latter duty, and argues that it should be free to negotiate away what it characterizes as “protections” it enjoys as a carrier under Part 212 when contracting to provide single-entity charters of large jet aircraft (100+ seats) to professional sports teams, colleges and universities, or any one of the Fortune 500 Companies.¹

The current charter rules contain provisions designed to protect both the funds of persons who pay for and the travel expectations of persons who travel on charter flights. While the interlocking financial security rules found in both Parts 212 and 380 were originally adopted as a substitute for the fitness requirements applicable to air carriers, *see* Notice of Proposed Rulemaking (“NPRM”), 57 Fed. Reg. 42864, 42867 (Sept. 16, 1992), the charter rules have been maintained to protect the expectations of charter customers and charter participants by ensuring (1) that the charter operates or that funds are available to refund the customer for service paid for but not provided, and (2) that charter participants, whether under Part 212 or Part 380, are not stranded by a direct air carrier’s inability or unwillingness to provide return lift for pre-paid round-trip carriage. *See* Order 2003-11-16 at 2-3.²

¹ The phrase “Fortune 500 Companies” comprises the 500 largest domestic U.S. companies ranked by total operating revenues, as reported in their latest fiscal year, including revenues from discontinued operations. This list is published annually by Forbes Magazine.

² During our last comprehensive rulemaking on this subject, we noted that “in the event of a stranding, charter participants are less likely than scheduled passengers to be carried by other airlines or to benefit from ticketing procedures common among scheduled carriers (*e.g.*, where travel on a defaulting airline is via a ticket issued by another carrier, or vice-versa),” and we concluded that “the public benefits of retaining financial protections for charter participant funds significantly outweigh the cost of compliance.” Final Rule, *supra*, 63 Fed. Reg. at 28230. In contrast, passengers who travel domestically by scheduled air transportation are protected by law under certain circumstances. Under section 145 of the Aviation and Transportation Security Act, airlines that operate on the same route as an insolvent carrier that has ceased operations must transport ticketed passengers of the insolvent carrier, “to the extent practicable.” Pub. L. 107-71, 115 Stat. 645 (Nov. 19, 2001) (now found at 49 U.S.C. § 40101 Note); *see also* 68 Fed. Reg. 4266-68 (Jan. 28, 2003) (notice of enforcement policy); 67 Fed. Reg. 69805-6 (Nov. 19, 2002) (same); 67 Fed. Reg. 53035-36 (Aug. 16, 2002) (same).

Thus, while the advance payment requirement may be seen, as suggested by Delta, as a benefit to the direct air carrier, the primary purpose of the rule is to protect the charter customer or charter participant against the risk of nonperformance by the carrier. Along with a Part 212 security agreement, the advance payment requirement helps make the air carrier's duty to return stranded charter participants largely self-enforcing. *See Arrow Air, Inc. v. Dole*, 784 F.2d 1118, 1127 (D.C. Cir. 1986); *see also* Final Rule, *supra*, 63 Fed. Reg. at 28230. This rationale appears to apply with equal force to both single-entity and public charter operations.

Nevertheless, regulations should not mandate the perpetuation of business practices that have outlived their utility. Delta has raised persuasive arguments that there are valid instances in which the burden imposed by the advance payment requirement may exceed its intended or potential benefits, both for the carrier and for the charter customer. Where a charter customer is knowledgeable about the monetary risks of a contract and able to protect itself financially and against stranding, significant efficiency gains may be possible by allowing the customer to retain its funds until travel is imminent or completed. Under such circumstances, we tentatively find that it is reasonable that the charter customer should be permitted to negotiate a charter agreement dictated by the marketplace. Delta has suggested that a focused exemption from the advance payment requirement would achieve such a result, and thus stimulate market innovation.

Specifically, Delta argues that most Fortune 500 Companies, professional sports teams, colleges and universities possess resources sufficient to guarantee ex-post payment for charter services rendered by a direct air carrier. While we agree that, for the limited purpose at issue here, Fortune 500 Companies may be viewed as a discrete class of potential customers whose members may be presumed to meet this standard, the other single-entity charterers included by Delta cover entities with too broad a range of financial capabilities and levels of expertise to ensure their protection as intended under the charter rules. There is no support in the current record for the proposition that all professional sports teams, colleges and universities, as such, are in a position to bargain knowingly and willingly with respect to the protections afforded by the advance payment requirement. Although many major league professional sports teams may be sufficiently well-informed and well-financed to self-insure against nonperformance by a direct air carrier and have access to adequate legal counsel, there is no evidence that all or even most professional sports teams, regardless of their professional level, are so fortunate. Similarly, there is nothing in the record to demonstrate that even most colleges or universities would be sufficiently well represented or financially equipped. Without the benefit of a more complete record, we are not prepared to issue an exemption that extends across the entirety of such broadly inclusive categories of customers.

Based on the foregoing, we tentatively find that it would be consistent with the public interest to grant Delta's request for exemption subject to the limitations and conditions discussed above. Also, we have tentatively decided to limit the exemption to one year, subject to renewal. Should Delta wish to seek renewal, we will require that it submit a formal application to the Department no later than 60 days prior to the expiration of the exemption.

granted here. In conjunction with that application, Delta should be prepared to provide information regarding its experience during the period that the exemption was in effect.³

Saying this, we recognize the concern that has been raised about Delta's securing a possible competitive advantage through this exemption. We have tentatively concluded that the present record as to that concern does not persuasively justify a different result from that which we have proposed. However, we are prepared to revisit this issue based on the comments received in response to this show-cause order, including, if the basis for concern is demonstrated, whether an appropriate remedy would be to accord comparable exemption authority, including on a blanket basis, to other similarly situated carriers. Finally, as noted above, we are unprepared on the basis of the current record to exempt Delta from the relevant Part 212 requirements for charterers other than Fortune 500 companies. Commenting parties are free to submit additional information to justify modification or expansion of the definition of eligible exempted charterers before we reach a final decision in this case.

ACCORDINGLY, acting under the authority of 49 CFR 1.56a:

1. We direct all interested persons to show cause why we should not issue an order granting to Delta Air Lines, Inc. ("Delta") a one-year exemption as described in this order from 14 CFR 212.3(e) with respect to single-entity charters using jet aircraft having more than 100 seats provided to Fortune 500 Companies, permitting in such cases only, that advance payment of the charter price may be waived in whole or in part by the carrier and charter customer jointly, and where such a waiver has been made only in part, the amount of any bond required under this exemption, or the amount of a corresponding substitute letter of credit (under Order 2003-11-16), need not exceed the amount of the charter price actually collected by the carrier.
2. We direct all interested persons having comments on or objections to the issuance of an order granting to Delta an exemption from 14 CFR 212.3(e), to file their comments or objections with the Department of Transportation, Dockets Operations and Media Management, M-30, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590, in Docket OST-2003-15944, and serve them upon all persons listed in Attachment A no later than 14 days after the service date of this order; answers to objections shall be filed no later than seven calendar days thereafter.
3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.
4. In the event no objections are filed, we will consider all further procedural steps to be waived, and will enter a final order granting the exemption.

³ Information that would be useful to the Department in determining whether renewal of this exemption is in the public interest would include the following: the number of total single-entity charter flights performed; the number of those that were provided for companies eligible for a waiver from the advance payment provisions under this exemption; the number of eligible companies that were offered the exemption and the proportion that accepted; the nature of the contracts for carriage where a waiver was given (*i.e.*, whether for a single flight or series of flights); and the identity and character of each company benefited by the waiver. Of course, the Department reserves the right to seek any information that it may deem relevant to any request for renewal by Delta.

5. We will serve a copy of this order on the persons listed in Attachment A.
6. We will publish a notice of this order in the Federal Register.

By:

KARAN K. BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov/>

Attachment A**SERVICE LIST FOR CHARTER ADVANCE PAYMENT EXEMPTION REQUEST**

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